

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SAMUEL HOWARD,

Petitioner,

vs.

E.K. McDANIEL, et al.,

Respondents.

2:93-CV-01209-LRH-LRL

ORDER

Petitioner Howard has filed a *pro se* motion for appointment of new counsel. Docket ##232/233. On February 16, 2007, this court appointed the Federal Public Defender's office (FPD) to replace Patricia Erickson, who had been relieved as Howard's counsel in this capital habeas action. Docket #223.

Howard asserts two reasons for requesting appointment of new counsel to replace the FPD, neither of which is a sufficient ground for granting his motion. First, Howard claims that Erickson, against whom he has filed a grievance with the Nevada State Bar Association, "works with" the FPD. Second, he alleges that the FPD represents inmates who physically attacked him on two occasions.

By statute, an indigent habeas petitioner asking the federal court to vacate or set aside a death sentence is afforded a mandatory right to legal counsel and related services. 18 U.S.C. § 3599(a)(2). Although there is no constitutional right to the appointment of counsel in habeas corpus cases

1 (*Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)), there is case law that suggests that, in some
2 respects, the statutory right to counsel in a federal habeas proceeding is on equal footing with a
3 defendant's Sixth Amendment right to counsel in a criminal trial. *See McFarland v. Scott*, 512 U.S.
4 849 (1994). Indeed, both the Eighth and Tenth Circuits have held that § 3599(a)(2) (previously
5 codified at 21 U.S.C. § 848(q)(4)(B)) implicates the same "substitution-of-counsel standards" as
6 does the Sixth Amendment. *See Johnson v. Gibson*, 169 F.3d 1239, 1254 (10th Cir. 1999); *Hunter v.*
7 *Delo*, 62 F.3d 271, 274 (8th Cir.1995).

8 Even where the Sixth Amendment guarantees appointed counsel, however, an indigent
9 defendant is not entitled to counsel of his own choosing. *Wheat v. United States*, 486 U.S. 153, 159
10 (1988). In *Johnson*, the court noted that for a petitioner in a capital habeas case to obtain a
11 substitution of counsel, he must "show good cause, such as a conflict of interest, a complete
12 breakdown of communication or an irreconcilable conflict which leads to an apparently unjust
13 verdict." *Johnson*, 169 F.3d at 1254 (quoting *United States v. Padilla*, 819 F.2d 952, 955 (10th
14 Cir.1987). In *Hunter*, the court noted that a criminal defendant's request for new counsel implicates
15 conflicting factors – "the need to ensure effective legal representation, the need to thwart abusive
16 delay tactics, and the reality that an accused is often genuinely unhappy with appointed counsel who
17 is nonetheless doing a good job." *Hunter*, 62 F.3d at 274

18 Accordingly, the court in *Hunter* held that the standards for granting substitute counsel for a
19 capital habeas petitioner are strict:

20 [S]ubstitution of counsel is a matter committed to the sound discretion of the district
21 court. To warrant substitute counsel, a defendant must show justifiable
22 dissatisfaction with appointed counsel [such as] a conflict of interest, an
23 irreconcilable conflict, or a complete breakdown in communication between the
attorney and the defendant. The defendant's right to counsel, however, does not
involve the right to a "meaningful relationship" between an accused and his counsel.

24 *Id.* (quoting *United States v. Swinney*, 970 F.2d 494, 499 (8th Cir. 1992)). In the context of
25 addressing motions for new counsel, the Ninth Circuit generally defines a *conflict of interest* as "the
26

1 existence of competing interests potentially affecting counsel's capacity to give undivided loyalty to
2 his client's interests;" while an *irreconcilable conflict* refers to a dispute or difference between a
3 client and his lawyer. *U.S. v. Moore*, 159 F.3d 1154, 1158 (9th Cir.1998).

4 Here, Howard's motion does not contain allegations showing that there is a conflict that
5 warrants the appointment of new counsel. With respect to Erickson's alleged connection with the
6 FPD, Howard states only that he has a pending bar complaint against Erickson and that she "works
7 with the [FPD], Attorneys Michael Pescetta and Franny A. Forsman." Docket #232. He attached to
8 his motion the caption pages for prior filings in his case on which both Erickson and the FPD's
9 office are listed as his counsel (docket ##150/189).

10 Based on a review of the record, this court notes that the FPD's involvement in Howard's
11 case has been very limited, if not non-existent, since the latest stay was lifted in February of 2005.
12 There is no indication that Erickson was ever employed by the FPD during the course of these
13 proceedings. When recently ordered to show cause why she should not be discharged as counsel,
14 Erickson made no reference to the FPD having any ongoing role in (or responsibility for) Howard's
15 representation. Howard has not explained, or even suggested, how his grievance against Erickson
16 creates a conflict of interest for the FPD.

17 As for Howard's claim regarding the FPD's supposed representation of inmates who attacked
18 him in the past, Howard does not identify any of the inmates by name or provide any specific
19 information regarding the nature of the FPD's representation of those inmates. Based on the dates
20 on the supporting documents submitted with his motion, the attacks to which Howard refers took
21 place at least seventeen years ago. Here again, Howard does not allege facts that establish either (1)
22 that the FPD would be subject to a conflict of interest or (2) that Howard has an irreconcilable
23 conflict with counsel.

24 **IT IS THEREFORE ORDERED** that petitioner's *pro se* motion for appointment of new
25 counsel (docket #232/233) is **DENIED**.

1 **IT IS FURTHER ORDERED** that respondents' "Motion to Stay Answer" (docket #234) is
2 **DENIED** as moot.

3 **IT IS FURTHER ORDERED** that the Clerk shall mail a copy of this order to petitioner
4 Howard at his place of confinement.

5 DATED this 20th day of June, 2007.

6
7
8


9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE